Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1717

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

QUESTIONS PRESENTED FOR REVIEW

I. Is it an abrogation of the presumption of innocence, in violation of 18 U.S.C. §3142(j), to require a guilty plea before pretrial release will be granted?

II. Is the Pretrial Detention Act, 18 U.S.C. §3142(e), unconstitutional when applied for purposes other than those specified by Congress?

III. May a conviction stand which is materially facilitated through misuse of the pretrial detention act?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Cases and Authorities	iii
Statement of Jurisdiction	iv
Constitutional Provision Involved	iv
Statement of the Case	1
The Detention Proceedings	4
The Trial	19
Impairment of the Defense	21
Argument	
I. It is an abrogation of the presumption of innocence to condition pretrial release upon a guilty plea.	26
II. The Pretrial Detention Act, 18 U.S.C. §3142(e), is unconstitutional when applied for reasons other than those specified by Congress.	28
III. Habeas corpus relief to correct an illegal pretrial detention is not mooted by a conviction which is the tainted fruit of that illegal detention.	30
Appendices	

TABLE OF CASES AND AUTHORITIES

Page

CASES

Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 — 30

Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292 — 30

United States v. Salerno, 481 U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) — 1, 28, 29

AUTHORITIES

United States Code

18 U.S.C. §3142(d) — 3
18 U.S.C. §3142(e) — i, 3, 4, 19, 28
18 U.S.C. §3142(j) — i, 27, 28, 30

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit from which the certiorari is sought was reported as Fassler v. United States, 858 F.2d 1016 (Fifth Cir. 1988). See Appendix A. This opinion was issued on October 27, 1988. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. §3145.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has been deprived of his Fifth and Fourteenth Amendment rights in not being afforded due process of law.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty or property, without due process of law:...

Further, petitioner was deprived of his Eighth Amendment rights in being required to post excessive bail.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that:

> Excessive bail shall not be required...

STATEMENT OF THE CASE

This is a case in which the United States has stipulated that it used pretrial detention as a plea-bargaining tool.

On May 25, 1987, this Court filed its opinion in United States v. Salerno, 481 U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The following day, May 26th, Peter Affolter was arrested in New Mexico while driving on the highway with 162 pounds of marijuana. Federal D.E.A. Agents, together with New Mexico and Louisiana State Troopers, then took Affolter and his marijuana to Baton Rouge, Louisiana, where on May 28th they instructed him to make telephone contact with the petitioner, Lawrence Fassler, and to request that petitioner come to Baton Rouge to assist him with car trouble.

Affolter made at least two recorded telephone calls, during the second of which he asked the person to whom he was speaking for assistance. Approximately two hours later,

petitioner and Charles Lee drove up to Affolter's disabled station wagon in a pickup truck. As they approached, Affolter jumped out of his vehicle and ostentatiously directed them to park immediately behind his vehicle. The arrival of Lee and petitioner, and subsequent events at the scene, were videotaped and recorded.

In compliance with his prior instructions from the D.E.A., Affolter then asked petitioner a question which the D.E.A. had designed to trick petitioner into giving an incriminating answer. Instead, petitioner replied "Huh?" Affolter then repeated his question, and petitioner's second response does not appear on the videorecording. Lee and petitioner were arrested moments later, and no further conversation occurred between Affolter and petitioner.

The initial appearance was held on May 29, 1987, before the Honorable Stephen Reidlinger, U.S. Magistrate. The petitioner was initially ordered held for ten days pursuant to 18 U.S.C.

§3142(d). Although petitioner had been told by D.E.A. Agents prior to the hearing that no detention motion would be filed, an oral detention motion was made by Asst. U.S. Attorney Bradley Myers for detention pursuant to 18 U.S.C. §3142(e), and the motion was set for a later hearing.

Immediately after the Initial Appearance, D.E.A. Agent Claude Davidson told petitioner that the detention motion had been made as a ploy by the U.S. Attorney, and would be withdrawn before it was heard by the court.

On June 1, 1987, Asst. U.S. Attorney Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the petitioner would plead guilty to charges carrying a maximum exposure of 30 years.

On June 9, 1987, the U.S. Attorney informed Rosemary Bickford and the petitioner that the government would drop the detention motion only if the petitioner pled guilty to charges carrying a maximum exposure of 20 years.

On June 11, 1987, D.E.A. Agent Ed Descenzo, specifically claiming to speak with the authorization and approval of U.S. Attorney Bradley Myers, told defense counsel Bickford and the petitioner that the government would drop the detention motion if the petitioner would first pay over to the D.E.A. the sum of Two Hundred Thousand to Two Hundred Fifty Thousand Dollars ($200,000-$250,000).

THE DETENTION PROCEEDINGS

On June 12, 1987, the detention hearing was held and Magistrate Reidlinger issued a detention order against the petitioner pursuant to 18 U.S.C. §3142(e). During the hearing, two of the three statutory bases for a detention order were readily discarded:

> Asst. U.S. Attorney Myers:
>
> I think that as a practical matter, the evidence is probably not sufficient to show that he is a risk to flee . . . I think that we would be silly to argue that he is a risk to flee. (Transcript of Hearing, pp. 72-73).
>
> U.S. Magistrate Reidlinger:

> [Danger to witnesses] is not one of the basis that they're urging for a detention. (Id., p. 13).

The Magistrate then barred the defense from cross-examining Agent Gigante as to statements she had just made suggesting such a basis.

As to dangerousness to the community, the only remaining basis, the government offered the following:

> Testimony of D.E.A. Agent Gigante: (At transcript p. 3).
>
> Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?
>
> A Yes, Sir.
>
> Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?
>
> A Yes, Sir, he was.
>
> Q Would you tell the Court what he was indicted for, please?

A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.

Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?

A Marijuana.

(Hearing Transcript, p. 4):

Q Do you know approximately how much?

A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

Q In doing your background check on Mr. Fassler, were you able to determine if he has any prior criminal convictions?

A Yes, he has a murder conviction from 1971 and a federal drug conviction and a state drug conviction.

Q Have you been able to obtain any information whether Mr. Fassler is currently on bond or on parole or probation for any other drug offense other than the one he's now under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport

that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also involved in heroin dealings.

Q And would you relate to the Court what information -- or why that information -- what the information is that has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in Tucson that was received in -- at the New Orleans Airport

(Pages 6 and 7):

and found to contain heroin.[1]

MR. MYERS: I have no further questions, your Honor.

THE COURT: Cross-examination.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.

A Yes.

Q Okay. Do you know how much that involved?

A I was told a suitcase full. I'm --

Q I'm sorry.

---

[1]On June 11, 1987, the previous day, the defendant had learned from Tucson D.E.A. agents that this incident had occurred two years before, and that someone other than the defendant had been identified as having made the shipment.

22 A I was told a suitcase full. I -- I do not know the exact

23 amount.

24 Q Okay. You don't know anything about that?

25 A No, I do not.

No other evidence of dangerousness to the community was presented to the court on the record.

The testimony of Miss Gigante was rebutted in several ways. First, Miss Gigante herself testified that she knew of no other indictments or charges pending against the petitioner for anything. (RT, p. 9, lines 5-15).

The U.S. Attorney acknowledged to the court that the petitioner's priors were twenty years old. (RT, p. 73, lines 20-22).

The petitioner presented witnesses who had come from Arizona and California to testify at the detention hearing.

The petitioner's wife testified that he had extensive family and business ties in Arizona, and had lived in the same place for over forty years. Similar testimony was also given by Agent Gigante.

The petitioner's employer testified as to the petitioner's employment at PageAmerica and role in the company. All the witnesses testified that the petitioner traveled extensively in connection with his business activities at PageAmerica and in buying and selling rare stamps and attending stamp shows.

The court refused to accept proffers from the petitioner as evidence in the hearing if the petitioner didn't testify. (RT, p. 63, lines 19-23).[2] The court also refused to allow the petitioner to take the stand without opening himself up for cross-examination on matters outside the scope of his direct testimony. (RT, pp. 66 and 67).

---

[2]In footnote 5 to its opinion filed October 27, 1988, the Fifth Circuit acknowledges that the Magistrate was in error.

The great bulk of the detention hearing consisted of cross-examination by the U.S. Attorney apparently attempting to seek out suspected hidden assets of the petitioner. Mr. Myers also argued for a high bond based upon the petitioner's possible ability to make one. (RT, p. 74, line 13, through p. 75, line 7).

Mr. Myers also asked the petitioner's wife questions which suggested that the government had information that the petitioner had paid his Arizona attorney a quarter of a million dollars in fees during 1984 and 1985.

The Magistrate found that:

> There wasn't much testimony on the weight of the evidence against the person, . . (p. 82, lines 15-16).

Finally, the Magistrate ordered detention:

> I find that the government has proved by clear and convincing evidence that there aren't any conditions or combination of conditions that would primarily assure the safety of the community because of his past involvement and alleged present involvement with transporting narcotic substance. And for those reasons, I'm going to order him detained.

The detention hearing was reopened on defense motion on June 19. At the rehearing the defense put on Stanton Bloom, the petitioner's attorney in Arizona, who testified and introduced documentary evidence about the petitioner's April arrest in Tucson.

Exhibit D-1 was a copy of the statement petitioner made to the investigating officer at the time of his arrest, explaining that the suitcase wasn't his and that he didn't know what it contained.

Exhibit D-2 was the Grand Jury transcript from Arizona wherein the investigating officer falsely represented the petitioner's statement to the Grand Jury.[3]

Exhibit D-3 was a letter in which the petitioner had requested to testify at the Grand

---

[3]On July 10, 1987, the Superior Court of Arizona remanded that indictment, making reference to the failure of the officer's testimony to accurately represent the facts. That indictment has not been refiled, and the statutory period to do so expired August 10, 1987.

Jury, as is permitted by Arizona law. The letter was not given to the Grand Jury before they heard and decided the matter.

Mr. Bloom testified that the marijuana involved in the Tucson case consisted of 611 grams, and that he had no knowledge of any heroin, or any other charges, against Fassler.

He also testified that he had received fees from the petitioner for work in 1984 and 1985 totalling $24,000, and not $250,000, as the U.S. Attorney had suggested to the court.

Finally, Mr. Bloom testified about the extensive experience and monitoring abilities of the federal pretrial services in Tucson, and of his contact with them in regard to this case. He testified that they had expressed a willingness to monitor petitioner on pretrial release:

> I know the person in charge of the pre-trial services in Tucson and they certainly would have no problem in monitoring Mr. Fassler. I have checked with them, there's no difficulty in that. We are of course, sixty miles from the Mexican border, the town of Nogales, Arizona is approximately sixty miles from Tucson. And that is the border town of -- crossing

> into Nogales, Sonora, Mexico. And so therefore, since our close proximity to Mexico, our pre-trial services are very stringent in terms of leaving the county and leaving Pima County. And certainly Mr. Fassler would be under those restrictions and could be checking with them at least two or three times a week whereby they monitor his services and from my knowledge, make -- are very tough and make unannounced visits to his home and things of that nature even while he's on pre-trial services. So they would have a very tight hold on him and that could be -- I assume, I have done it, in fact, in some other federal courts, but that can be a transfer of pre-trial services to another jurisdiction. (Pages 15-16).

The government's cross-examination of Mr. Bloom consisted entirely of questions relating to the petitioner's finances and to fees paid to defense counsel. The Magistrate overruled objections to those questions and ordered that they be answered.

No other evidence was presented.

On June 19, 1987, the Magistrate reopened the detention hearing and heard further evidence from witnesses for the petitioner. He then continued that hearing until June 24, 1987, for argument by counsel and a ruling.

On June 24, 1987, prior to the hearing, Magistrate Reidlinger met in chambers with the U.S. Attorney and defense counsel. The petitioner was unaware that the meeting was taking place. At that meeting, the magistrate was informed by the U.S. Attorney and by defense counsel that the government was not alleging heroin involvement and threat of violence as reasons for the detention motion.

At the same time Magistrate Reidlinger told defense attorneys Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the petitioner agreed with D.E.A. agents in Tucson, Arizona, to act as a confidential informant for them.

Magistrate Reidlinger then opened the hearing and reaffirmed his earlier detention order.

On August 11, 1987, the defense filed a motion for review of the detention order by the District Court Judge. The motion was set for August 21st at 10:00 a.m., a date and time already

scheduled for an evidentiary hearing on a pending suppression motion. (CT 36).

On August 18th, the court issued an order denying the suppression motion and cancelling the pending evidentiary hearing. (CT 133). Late on August 20th, defense counsel Nathan Fisher was notified by phone that the motion to reconsider the detention order would be heard the following day. (RT, 8/21/87, pp. 8-10). Some discussion was had on August 21st and at a status conference on August 27th an evidentiary hearing was rescheduled for September 3rd.

At the conclusion of the September 3rd hearing, the court took the motion to review the detention order under advisement. During that hearing the United States Attorney admitted that he had used the detention motion for plea-bargaining purposes, and stipulated that he had conditioned dropping the detention motion upon a guilty plea. (RT, 9/3/87, p. 8, lines 12-18) (Appendix D).

On Friday, September 4th, the petitioner caused his original Petition for Writ of Habeas Corpus to be sent to the Clerk of the District Court by Federal Express overnight delivery from Tucson, where he had had it typed. It was received by the Clerk in Baton Rouge on September 7th. (Affidavit filed 9/16/87, Appendix F). However, it was not filed by the Clerk until September 10th, the same date on which the District Court denied the then pending motion for review of the detention order. The trial began three business days later.

At the beginning of the trial on September 15th, the District Court ruled that the petition for habeas corpus would be considered after the trial. The petitioner was convicted on September 16th, and the petition for habeas corpus was denied on September 30th as moot. (Appendix H). A motion for reconsideration was filed in the District Court and it was denied on October 26, 1987. (Appendix I).

Appeal of the denial of habeas corpus was taken to the Fifth Circuit Court of Appeals, and in a reported opinion filed October 27, 1988, that court affirmed the decision below. (Appendix A). Rehearing was denied by the Circuit Court on November 21, 1988, (Appendix B), and this appeal follows.

Neither the District nor the Circuit Court has ever addressed itself to the uncontested facts of the government's use of the Pretrial Detention Act, 18 U.S.C. §3142(e), for plea-bargaining purposes.

THE TRIAL

The very brief trial in this matter consisted of little more than police testimony about the arrest of Affolter in New Mexico, his removal to Baton Rouge, the recording of two phone calls in Baton Rouge, and the videotaping of the arrival of Lee and petitioner and their arrest.

One Louisiana State Trooper testified at length as to his theory why there was no recorded

response by petitioner to Affolter's repetition of the trick question he had been instructed to ask. The Trooper then went on to testify that notwithstanding the failure of his electronic equipment to record any answer, he was personally able to hear petitioner make some kind of an affirmative response to Affolter from his vantage point in an undercover van 100 yards away. A second State Trooper who was also in the same van at the time did not claim to hear such a response, and, according to the testimony of a D.E.A. Agent who testified that she was listening to the event over separate receiving equipment in a different vehicle, she did not hear it.

Both Louisiana State Troopers were allowed to testify that they had made voice identifications of the second party to Affolter's recorded phone conversations as being petitioner by comparing the voice on the recordings of the phone calls with petitioner's voice on the videorecording, even though petitioner's voice does not appear on the

videorecording.

D.E.A. Agent Gigante also interjected nonresponsive testimony on her cross-examination to the effect that petitioner had a long history of previous violations and that Affolter had said he was bringing the marijuana to petitioner, and the jury was duly instructed to disregard that testimony.

Lee was acquitted and the petitioner was convicted on both counts.

IMPAIRMENT OF THE DEFENSE

The petitioner is a skilled and experienced paralegal, who has briefed and prevailed in criminal cases, on behalf of others, in the courts of many jurisdictions, including the Supreme Court of the United States. He had no access to a law library or any other legal materials while in pretrial detention.

The petitioner has personal investigative skills and resources which he was unable to apply while in pretrial detention. There was extensive

investigation to be done in New Mexico, Arizona and California which went undone by virtue of the pretrial detention and the petitioner's lack of sufficient financial resources to hire them done.[4]

The petitioner was under order of the U.S. Magistrate to finance and pay for his own defense. The Magistrate's determination of non-indigency was based upon the petitioner's earnings when not detained. The pretrial detention resulted in the reduction of the petitioner's salary by $2,000 monthly, and imposed substantial additional costs upon the petitioner to maintain contact with his private and professional life.

Petitioner's ability to maintain outside contacts by mail from the place of confinement was severely impaired by the failure of the East

---

[4]A comprehensive and detailed exposition of the investigation and other work needed by the defense appears in the Motion for Continuance filed by the appellant, pro se, in District Court Case No. 87-019 (Cir. No. 87-3915), the record of which has been designated as part of the record in this cause. A copy of the Motion for Continuance is attached hereto as Appendix E.

Baton Rouge Parish Prison to deliver much of his mail to him.

The only effective means of contact with his personal and business ties which the petitioner had while in pretrial detention was through the use of long distance telephone and private overnight delivery services. Both were very expensive and the telephone access was not private.

The petitioner was unable to consult with his attorney on a regular basis and was unable to inform himself as to the progress of the case.

The petitioner was unable to review the physical evidence in the case before trial, particularly the videotape which required access to electronic equipment not available to or permitted the petitioner while confined.

The detention order caused the petitioner to enter and exit the courtroom during trial from the courthouse holding tank, under guard of two or three U.S. Marshals, rather than enter and exit freely as his codefendant Lee was able. The

petitioner was unable to freely move about the courtroom to consult with his counsel, as was the codefendant, and was unable to accompany his counsel during recesses in the proceedings.

Much of the preparation and investigation for trial in this cause was of such a nature that it required no special expertise, and could have easily been accomplished by the petitioner (or any other layman of average experience). During the weeks immediately prior to trial the petitioner was aware that his counsel had failed in many respects to prepare for the trial,[5] and he brought that lack of

---

[5]The one area where petitioner felt counsel was properly prepared going into trial was in the preparation of an audio-visual expert to testify about the videotape. Counsel had told petitioner in July that he had spent several full days going over the videotape with the expert. However, it quickly became apparent at trial that the expert's trial testimony was confused and unprepared; and during an interview which the petitioner managed to arrange at the jail weeks after the trial he learned that his counsel had never prepared or explained to the expert what the issues for him would be, but had instead given him a completely erroneous understanding of what he would be asked to testify about. Once petitioner learned this, and simply explained the question at hand to the expert, the expert was immediately and readily able to determine that the testimony which had

preparation to the court's attention in his pro se Motion for Continuance, (Appendix E), which was filed, considered, and denied in open court on September 15, 1987, immediately prior to the start of the trial. Petitioner was unable to personally rectify the shortcomings in trial preparation because he was detained.

The petitioner was unable to approach his codefendant to discuss mutual or individual strategies while detained.

The petitioner was unable to seek out Peter Affolter, the person who had set up the petitioner at the government's direction -- but who the government did not present at trial -- because petitioner was detained.

---

been offered at trial by the Louisiana State Troopers was false and scientifically impossible. He then prepared his own affidavit, and secured the services of a second audio-visual expert who also prepared an affidavit. Both of those affidavits became the basis of the Motion for a New Trial which was filed on November 4, 1987. (Appendix J).

The petitioner was unable to discover the truth about counsel's failure to prepare the expert before trial because he was being detained.

A contemporaneous record of these prejudices to the petitioner's defense exists in the September 15, 1987, Motion for Continuance. (Appendix E).

ARGUMENT

I. IT IS AN ABROGATION OF THE PRESUMPTION OF INNOCENCE TO CONDITION PRETRIAL RELEASE UPON A GUILTY PLEA.

In this cause the facts make clear, and the United States has stipulated, that the government used the Pretrial Detention Act for plea-bargaining purposes. The government made a variety of offers to the petitioner in exchange for which it would drop the pretrial detention motion. Among them were the request for payment of $200,000-$250,000 to the D.E.A., and the offer by the Magistrate to release the petitioner if he would agree to become an informant for the D.E.A. in Tucson. And, throughout, there was the requirement by the United States Attorney that the petitioner plead guilty to the indictment, first with

an exposure at sentencing of 30 years, and later with an exposure of only 20 years, to secure his release from pretrial detention.[6]

The petitioner, refusing the U.S. Attorney's "Hobson's choice," went to trial sans bail.

18 U.S.C. §3142(j) is directly on point in this case. That statute reads:

> Presumption of Innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Presumption of innocence is defined in Black's Law Dictionary as, "A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt." Plea bargaining is defined in Black's as, "The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty . . ." In this case it

---

[6]The petitioner faced an exposure of 60 years by going to trial.

required that the petitioner plead guilty to a count with exposure of at least 20 years incarceration.

Thus, by definition, plea bargaining which requires a guilty plea to secure pretrial release on bail is, a fortiori, an abrogation of the presumption of innocence. As such, it constitutes a violation of 18 U.S.C. §3142(j) and a use of the Pretrial Detention Act which is barred by that statute.

II. THE PRETRIAL DETENTION ACT, 18 U.S.C. §3142(e), IS UNCONSTITUTIONAL WHEN APPLIED FOR REASONS OTHER THAN THOSE SPECIFIED BY CONGRESS.

This Court, in United States v. Salerno, 481 U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (987), upheld the pretrial detention portion of the Bail Reform Act of 1984, 18 U.S.C. §3142(e), as against the facial attack mounted by Salerno. In doing so, Chief Justice Rehnquist wrote that "pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due

Process Clause." Salerno at 95 L.Ed.2d 709. He also wrote "that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants," in rejecting the Eighth Amendment argument that the Excessive Bail Clause rendered the Act unconstitutional. Id. at 95 L.Ed.2d 712.

In the case at bar, requiring a plea of guilty to a charge carrying an exposure of 20 or 30 years imprisonment in exchange for pretrial release is, on its face, to require petitioner to accept punishment as a condition of bail. Moreover, it renders hollow the "primary function of bail": safeguarding the petitioner's right to a fair trial. This petitioner could have secured his release on bail only by waiving his right to trial and due process by pleading guilty.

Under these conditions, the Pretrial Detention Act is unconstitutional as it was applied to this petitioner.

Due Process also infers a right to the protection of 18 U.S.C. §3142(j), which preserves petitioner's presumption of innocence. By requiring a guilty plea in order to secure bail, the government unconstitutionally deprived the petitioner of that protection.

III. HABEAS CORPUS RELIEF TO CORRECT AN ILLEGAL PRETRIAL DETENTION IS NOT MOOTED BY A CONVICTION WHICH IS THE TAINTED FRUIT OF THAT ILLEGAL DETENTION.

Much as the Exclusionary Rule to redress violations of Fourth Amendment Rights has evolved to deter lawless conduct by federal officers (Rea v. United States, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292) and to close the doors of the federal courts to any use of evidence unconstitutionally obtained, (Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437), sound public policy demands that this Court prohibit governmental abrogation of the presumption of innocence by denying the prosecution the fruit of

its wrongdoing.

On September 15, 1987, the District Court declared that it would not take up the habeas petition until after the trial which it was about to begin. It did so immediately after denying petitioner's pro se Motion for Continuance, which set forth many of the prejudices to petitioner's defense resultant from the detention, and in cognizance of the government's stipulation before the same judge several days earlier: that it had used the pretrial detention as a plea bargaining device. That the court was also familiar with the habeas petition is shown by its discussion of the matter at the time, demonstrating some previous familiarity and knowledge of the subject.

Thus the district court, to all intents and purposes, was denying the petition on September 15th when it chose to set it over until after the trial, for regardless of the outcome of the trial, the pretrial nature of the offending detention would have ceased to exist. The petitioner was

then forced to trial absent the benefits of the presumption of innocence, and suffering from the several disabilities which were enunciated in advance in the Motion for Continuance.

Nothing which occurred at trial negated that prejudice. The government's evidence was underwhelming, feeble and false on its face. (i.e., Trooper Mixon's claim to have heard an incriminating admission which is absent from the videorecording; Mixon and Trapp's assertion that they compared the voice on the recorded phone calls with petitioner's voice on the videorecording -- even though it does not appear there. A fair review of the record shows petitioner was almost certainly convicted by reason of the stricken testimony of a D.E.A. Agent who volunteered his 20-year-old record, and by the ineffective representation of his counsel.

However, ineffective representation is <u>not</u> the issue here. To require that petitioner pursue that avenue of post-conviction relief is only to

further reward the government for its transgression by prolonging his incarceration. At issue here is the illegal pretrial detention, which enabled the ineffective representation and the inappropriate prosecution evidence to accomplish the transgressor's goal: to secure a conviction.

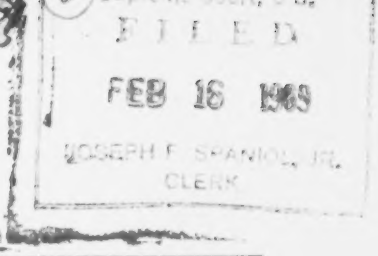
As the Motion for Continuance (Appendix E) makes clear, petitioner had some inkling of his counsel's shortcomings prior to the start of trial, and had he been free on bail it is reasonable to assume that he would have taken steps to cure them. Likewise, had he been on bail and able to participate freely in his own defense, he would have been in a position to recognize and counter the false testimony of the State Troopers when it was offered. Also, he would have been able to do such simple things as enter and exit the courtroom with his counsel, or freely approach counsel in the courtroom, advantages which in the context of this case may have sufficed to bring the trial to a different verdict.

It is just such disabilities as these which the courts have historically had in mind when discussing the reasons for, and importance of, bail for defendants in criminal cases. To now say that this most vital right can be ignored by the government, immunizing it with the natural and foreseeable fruit of its wrongdoing, makes a mockery of the law.

A conviction which is the proximate result of illegal pretrial detention must be set aside, and this petitioner must be set free.

RESPECTFULLY SUBMITTED this 28th day of March, 1989.

Lawrence Fassler
in propria persona



No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAWRENCE ALLEN FASSLER,
Petitioner-Appellant

vs.

THE UNITED STATES OF AMERICA,
Respondent-Appellee

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lawrence Fassler
in propria persona
02061-095
Box 1700
Black Canyon Stage 1
Phoenix, Arizona 85029

INDEX
TO APPENDICES

A	Fifth Circuit Opinion dated October 27, 1988
B	Order Denying Rehearing dated November 21, 1988
C	Transcript Excerpts from June 12, 1987 hearing
D	Transcript Excerpts from September 3, 1987 hearing
E	Motion for Continuance dated September 15, 1987
F	Affidavit re Petition for Habeas Corpus dated September 16, 1987
G	Petition for Habeas Corpus filed in District Court September 10, 1987
H	District Court Order Denying Habeas Corpus dated September 30, 1987
I	District Court Order Denying Rehearing dated October 1987
J	Expert Affidavits Regarding Videotape

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

LAWRENCE ALLEN FASSLER,	)	NO. 87-3857
Respondent-Appellee	)	
v.	)	OPINION
UNITED STATES OF AMERICA,	)	Oct. 27, 1988
Respondent-Appellee.	)	

Defendant appealed from order of the United States District Court for the Middle District of Louisiana, John V. parker, Chief Judge, denying his motion for writ of habeas corpus challenging pretrial detention order. The Court of Appeals held that defendant's request for release from pretrial confinement, made in motion for writ of habeas corpus, was moot following defendant's conviction.

Affirmed.

1. **Habeas Corpus (key) 33**

Although statute requiring prompt determination of appeals from pretrial detention orders does not provide exclusive means by which person under indictment can challenge pretrial detention, terms of Bail Reform Act and potential for abuse of writ of habeas corpus and for unnecessary duplication of appeals should ordinarily provide strong incentive for defendants to employ appeals under statute. 18 U.S.C.A. §3145.

2. **Habeas Corpus (key) 87**

Defendant's request for release from pretrial confinement, made in motion for writ of habeas corpus, was moot following defendant's conviction. 28 U.S.C.A. §2241(c)(3); 18 U.S.C.A. §3145.

3. **Bail (key) 42**

Whether defendant will suffer severe financial hardship is not relevant to determination of whether pretrial detention of defendant is warranted; financial resources of defendant are relevant only insofar as they reflect likelihood that

defendant will appear before court when required. 18 U.S.C.A. §3142(g).

Appeal from the United States District Court for the Middle District of Louisiana.

Before REAVLEY, POLITZ, and JONES, Circuit Judges.

PER CURIAM:

Appellant Fassler was convicted and is now incarcerated pending appeal of his conviction for knowingly and intentionally possessing 162 pounds of marijuana with intent to distribute. Fassler was ordered detained prior to trial pursuant to the Bail Reform Act, 18 U.S.C. §3142 et seq. In this appeal, he purports to seek habeas corpus relief because of the illegality of his pretrial detention. The relief he seeks is plainly not available. We affirm the district court's denial of relief, with cautionary notes to courts and detainees alike concerning their responsibilities under the Bail Reform Act.

Fassler was arrested May 28, 1987, after he was videotaped in the act of receiving marijuana from a government informant. At the time, he was on release pending trial on drug charges in Arizona. The government moved for pretrial detention at his initial appearance before the magistrate the next day, as is required to preserve its right to such relief. United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir. 1985). Two pretrial detention hearings were then held June 12[1] and June 19, 1987, and the defendant offered evidence and testimony of various sorts. The matter was again continued until June 24 at defendant's request. The magistrate then determined that, although some earlier grounds for defendant's detention no longer applied, there was probable cause that the defendant had committed an offense for which a maximum term of imprisonment exceeding ten years was prescribed

---

[1]The hearing was set for June 2nd originally, but it was continued at defendant's request.

in the Controlled Substances Act. Further, the magistrate found that the defendant had failed to rebut the presumption that no condition would reasonably assure Fassler's appearance at trial and the safety of the community.

Fassler had been advised of his right to appeal the detention order to the district court pursuant to 18 U.S.C. §3145. He so moved on August 11, and the district court heard oral argument and additional evidence and took the matter under advisement until September 3. On September 10, 1987, five days prior to trial, the trial court affirmed the magistrate's detention order after a de novo review of the evidence and arguments of the parties. Fassler did not appeal this decision to the Court of Appeals as is provided by 18 U.S.C. §3145.

Instead, Fassler filed a motion for writ of habeas corpus with the district court on September 10, alleging broad-based challenges to the detention order. Fassler contended that the detention order

was being used illegally and unconstitutionally as a punitive tool to force him to plead guilty; that it was not imposed by an impartial magistrate; that it placed an excessive and unjustified burden upon his defense and impaired his trial preparation; and that it was based on accusations of heroin trafficking that had no evidentiary foundation. The district court denied this petition on September 30, after Fassler had been convicted at trial. The court elected to treat the petition as a writ of habeas corpus prior to trial, sought pursuant to 28 U.S.C. §2241(c)(3). The court found his request for relief from custody to be mooted by his conviction and subsequent legal detention pursuant to 18 U.S.C. §3143. The court additionally denied Fassler's petition on the merits, finding that most of his complaints had been resolved in the court's prior de novo review of the pretrial detention order. Fassler has appealed.

[1] That we have jurisdiction does not mean that Fassler has sought an appropriate remedy for

pretrial detention or that the case is not moot. For whatever reason, Fassler bypassed the expedited appeal procedure noted by the Supreme Court as an essential safeguard provided by the Bail Reform Act. 18 U.S.C. §3145; United States v. Salerno, ___ U.S. ___, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Section 3145 provides that appeals to the district court and court of appeals from pretrial detention orders shall be determined promptly. In this case Fassler was tried expeditiously and it might have been difficult to secure prompt appellate review within the terms of the statute.[2] Acting cautiously, we decline to hold that §3145 provides the exclusive means by which a person under indictment can challenge his pretrial detention. Nevertheless, the terms of the Bail Reform Act and the potential for abuse of the writ and for unnecessary duplication of appeals, as

---

[2]In an effort to expedite appeals under the Bail Reform Act, our Court has adopted filing forms that pretermit the necessity for the preparation of formal briefs. This measure alone should save considerable time on appeal.

demonstrated below, should ordinarily provide strong incentive for defendants to employ Section 3145 appeals.

[2] Because Fassler is now legally in federal custody, we must hold that his request for release from pretrial confinement is moot. See, e.g., Medina v. People of the State of California, 429 F.2d 1392 (9th Cir. 1970) (appeal from writ of habeas corpus for unconstitutional bail revocation mooted by defendant's subsequent conviction); Traber v. United States, 466 F.2d 483, 485 (5th Cir. 1972) (issue of excessive bond not appropriately raised in §2255 motion).[3]

---

[3]We are mindful of the Supreme Court's decision in Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968) (writ of habeas corpus not moot even though prisoner completed his sentence before final adjudication because conviction resulted in certain collateral consequences to the individual). Fassler's pretrial detention, however, carries with it none of the disabilities or burdens which have concerned the Court. For instance, Fassler is not barred from future occupations because of his pretrial detention. Nor does his pretrial detention exclude him from later participation in elections or deny him the opportunity to serve as a juror.

Notwithstanding the mootness of this appeal, Fassler's complaints concerning the basis of his pretrial detention and its effect on the subsequent trial were not unanswered. We believe the allegations of his petition demonstrate instead an ingenious device for securing redundant review of these contentions. Most of his complaints could have been or were dealt with by the district court's review of the magistrate's pretrial detention orders. Fassler contends, for instance, that the magistrate improperly relied on evidence of Arizona charges which may have been later dropped and erroneously evaluated their significance under the Bail Reform Act. See 18 U.S.C. §3142(g)(3)(B). The district court's opinion on review of the detention order specifically considered this issue. Fassler contends that he was unable to prepare for trial while he was incarcerated and that this severely hampered his defense, in view of his considerable experience as an investigator and a criminal law paralegal. The Bail Reform Act,

however, states that any pretrial incarceration order shall afford a defendant the opportunity reasonably to consult with counsel and prepare his defense. 18 U.S.C. §3142(i)(3). Fassler could have moved for additional relief to prepare his defense, or he could have challenged this facet of detention on review by the district court, but it appears that he did neither. We cannot review this contention because he did not raise it before the district court. Pierce v. United States, 525 F.2d 933 (5th Cir. 1976).

[3] Additionally, Fassler contends vigorously that the threat of pretrial detention was employed to coerce a guilty plea.[4] The district court, ruling on Fassler's §2241(c) petition, rejected this

---

[4]Fassler also contends that the pretrial detention imposed a severe financial hardship. We pretermit further discussion of this issue, noting that it is not relevant to the determination of whether pretrial detention is warranted. Section 3142(g) identifies those factors to be considered in the pretrial detention hearing. The financial resources of the defendant are relevant only insofar as they reflect the likelihood that the defendant will appear before the court when required.

contention because, as Fassler had gone to trial, the coercion was evidently unsuccessful. There is no reason why Fassler could not have alleged such a claim in his appeal from the magistrate's detention orders, at a time that it would have been entitled to expedited consideration.[5] Finally, to the extent that Fassler characterizes his objections to pretrial detention as implicating the constitutionality of that order, he plainly could have pursued that issue in his appeal pursuant to §3145. The district court overruled it in its order on the §2241 petition, however, and we concur

Other charges connected to Fassler's pretrial detention can be pursued by him in this Court at a later date. He adverts to what he considers the

---

[5]Fassler asserts that the magistrate erred during the detention hearing by refusing to accept his proffers of his affidavit as evidence because of his accompanying refusal to testify. Testimony is not required. See 18 U.S.C. §3142(f)(2); United States v. Parker, 848 F.2d 61 (5th Cir. 1988). The magistrate's error, however, should have been attacked under §3145, and we do not have the full transcript of the detention hearings to determine exactly what happened.

paucity of evidence supporting his conviction, an issue that undoubtedly will be determined on his pending direct appeal. He also asserts that he received ineffective assistance of counsel before trial, in part because of the conditions of his detention. This issue can be raised in a collateral attack on his conviction pursuant to 28 U.S.C. §2255 -- but not now. We have held that a criminal defendant may not collaterally attack his conviction until it has been affirmed on direct appeal. Jones v. United States, 453 F.2d 351, 352 (5th Cir. 1972)

The government has asked us to hold that Fassler has abused the writ of habeas corpus by obtaining two bites at the apple to challenge his conviction and pretrial detention order. We decline to do so, because his approach was novel and not wholly without merit. Similar indulgences will not be afforded criminal appellants in the future. Fassler's maneuver in most cases that we can conceive will result in duplication of effort by

the courts and government with no obvious benefit to be gained by the defendant. The moral of this opinion should be clear: defendants have the responsibility to appeal pretrial detention orders promptly, and we, the courts, have an equal responsibility to adjudicate them promptly.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3857

LAWRENCE A. FASSLER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/27/88, 5 Cir., 198__, _____ F.2d _____)

(NOVEMBER 21, 1988)

Before REAVLEY, POLITZ and JONES, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal

Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll ont he reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX C

Transcript excerpts from June 12, 1987 hearing

Testimony of D.E.A. Agent Gigante:
(At transcript p. 3).

Q Was Mr. Fassler arrested on this -- for this case or this offense on May 28th of this year?

A Yes, Sir.

Q Was he indicted by the Grand Jury sitting in the Middle District of Louisiana?

A Yes, Sir, he was.

Q Would you tell the Court what he was indicted for, please?

A Possession of marijuana with intent to distribute and conspiracy to distribute marijuana.

Q What drug was involved in -- or what drug was Mr. Fassler accused of dealing in?

A Marijuana.

(Hearing Transcript, p. 4):

1 Q Do you know approximately how much?

2 A A hundred and sixty-two pounds.

(Id., pp. 5 and 6):

14 Q In doing your background check on Mr. Fassler, were you

15 able to determine if he has any prior criminal

16 convictions?

17 A Yes, he has a murder conviction from 1971 and a federal

18 drug conviction and a state drug conviction.

24 Q Have you been able to obtain any information whether Mr.

25 Fassler is currently on bond or on parole or probation

1 for any other drug offense other than the one he's now

2 under arrest for?

A Yes, Sir, when we arrested him he was out on bond for another marijuana charge out of Tucson, Arizona.

Q Is that a state or federal charge?

A A state charge.

Q Do you know approximately when that offense occurred?

A April of this year.

Q Do you -- are you familiar with the facts of that offense?

A Yes, Sir. He took possession of a suitcase at an airport that was found to contain marijuana.

Q During your investigation have you been able to determine whether Mr. Fassler is involved with any drug other than marijuana?

A Yes. We have information to believe that he is also

involved in heroin dealings.

Q And would you relate to the Court what information --

or why that information -- what the information is that

has led you to believe he's involved with heroin?

A He was witnessed mailing a package at the airport in

Tucson that was received in -- at the New Orleans Airport

(Pages 6 and 7):

and found to contain heroin.[6]

MR. MYERS: I have no further questions, your Honor.

THE COURT: Cross-examination.

---

[6]On June 11, 1987, the previous day, the defendant had learned from Tucson D.E.A. agents that this incident had occurred two years before, and that someone other than the defendant had been identified as having made the shipment.

(Page 8):

Q You also indicated that there was some -- you had some knowledge of his being involved in some other charges. I believe one of the charge -- one of the activities was possession of marijuana.

A Yes.

Q Okay. Do you know how much that involved?

A I was told a suitcase full. I'm --

Q I'm sorry.

A I was told a suitcase full. I -- I do not know the exact amount.

Q Okay. You don't know anything about that?

A No, I do not.

APPENDIX D

Transcript excerpts from September 3, 1987 hearing (page 8, lines 12-18)

MR. MYERS: We will -- We will stipulate that during negotiations before Mr. Fassler -- before the detention hearing, that the government represented to Mr. Fassler and his lawyer that if he would agree to plead guilty to the terms of our offer and work with the agents, then we would consider recommending that he be released on a bond. I'll stipulate to that.

APPENDIX E

MOTION FOR CONTINUANCE

Filed September 15, 1987 in open court

This is a typewritten copy of the Motion for Continuance filed in court of Sept. 15th, 1987. The original as filed was handwritten, and this copy is typed from a handwritten copy of the original. It is a faithful reproduction of the original as filed.

The AFFIDAVIT which follows, dated Sept. 15th, 1987, was also filed as a handwritten original, and this typed copy is made from a handwritten copy of that original.

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CASE NO. CRIM. 87-019
	)	
vs.	)	
	)	
LAWRENCE ALLEN FASSLER,	)	MOTION FOR CONTINUANCE
	)	
Defendant.	)	
	)	

COMES NOW the Defendant, Lawrence Allen Fassler, and moves the Court for a continuance of 90 days in the trial date set in this matter, for the reasons set forth below:

I) The present trial date was set on July 31, 1987. At that time the Court indicated that if a continuance would be required the Court would entertain such motion at a subsequent date. Also at that time the Petitioner believed and realized that whether or not he continued to be incarcerated it would be impossible to properly prepare and investigate this case in order to meet

the requirements of due process by the first regularly scheduled trial date, and communicated that belief to this counsel.

In response to Petitioner's concern about a continuance, his counsel assured him that a continuance would be obtained at an appropriate time. Later--on August 13, 1987--and thereafter, Petitioner's attorney continuously assured Petitioner that the Prosecutor would be unavailable, due to resignation, at the first regularly scheduled trial date, and that a continuance would necessarily be set by the parties.

Petitioner relied on the representations of counsel because while he has diligently tried to prepare and investigate the case he has realized at all times that the investigation would not be accomplished in time.

On Sept. 3rd, for the first time, and to Petitioner's surprise, counsel informed the Petitioner that it might become difficult to obtain a continuance. Petitioner's counsel then suggested

that Petitioner accept a plea bargain agreement the Petitioner had rejected three months previously, and continues to reject.

Through Sept. 3rd Petitioner and his counsel have had no discussions as to trial strategy, or preparations for trial, whatsoever, and Petitioner is of the opinion that counsel is woefully unprepared for trial.

On Sept. 8th, 1987, the first time Petitioner saw counsel subsequent to Sept. 3rd, he discussed the above with counsel and insisted that counsel seek a continuance. Counsel replied by informing Petitioner that he would be out of the jurisdiction and that he would contact Petitioner on Sept. 11th to further discuss the matter.

Although Petitioner has continually inquired as to the continuance with his counsel, Petitioner has now become duly concerned that any further delay in filing the Motion for Continuance would prejudice the parties and the Court, advised in the premises. Petitioner therefore feels it incumbent

to immediately inform the Court of some of the many material reasons why a continuance should be granted.

II) Petitioner expects to go to trial in this matter, and believes that he has a meritorious defense at trial. That defense complicated and difficult, and requires extensive investigation and preparation which has not yet been accomplished. Petitioner needs the time herein requested to advance that defense.

Among the many specific items which require further investigation and preparation are the following:

A. Background investigation of Peter Affolter, expected to be the key prosecution witness. Among specific items about Mr. Affolter still requiring investigation are:

1. His background and prior criminal history in Switzerland.

2. His background and prior criminal history in South America.

3. His landholdings in South America, including Brazil, Columbia and Bolivia.

4. His prior criminal history engaged in the smuggling of cocaine from South America to Switzerland through the United States.

5. Outstanding criminal cases against Mr. Affolter and his wife at this time.

B. Background investigation of Allen Haysbert, suspected of being an undisclosed confidential informant in this cause. Specific matter of interest include:

1. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1985, in San Mateo County, California.

2. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1986, in San Mateo County, California.

3. Circumstances and disposition of drug charges brought against Mr. Haysbert in 1987, in Tucson, Arizona, directly related to this case.

C. Circumstances and specifics as to the search of a station wagon in New Mexico which led to this indictment. This search is believed to have been a pretextual stop arranged by the D.E.A. in such a manner as to allow them to deny involvement. Among specific reasons for this belief are the following:

1. Information from one "Tracey" Doe in Tucson, Arizona who had specific knowledge of the details of Petitioner's arrest on the date of that arrest, including information pertaining to events preceding the arrest, and who is reputed to be the close companion of a D.E.A. Agent in Tucson.

2. The circumstances of the search, which are consistent with other such searches in New Mexico generally believed by criminal law professionals in Arizona to be a continuing series of pretextual stops.

3. Statements made to the Petitioner by D.E.A. Agents in this case when he

suggested to them that the search was not what it seemed, including admissions the D.E.A. does engage in such activity and including specifics of other such activity by the D.E.A.

4. Statements made by a New Mexico State Trooper in this Court on July 31, 1987, which are strongly and advisedly believed by the Petitioner to be contrary to the true facts.

5. Information developed by private Investigator Victor Bouchet which suggests D.E.A. involvement in this case in Tucson, Arizona, prior to the search in New Mexico.

D. Prior statements of Peter Affolter both D.E.A. and New Mexico police, which are believed to exist and to be "Brady" material which has not, but should have, been disclosed to the defense by the government.

III) Many, if not most, of the matters listed above, as well as other matters not mentioned herein, could have, and would have, been investigated by the Petitioner personally had he not been

incarcerated during the past 3-1/2 months pursuant to the U.S. Attorney's misuse of the Federal Pre-Trial Detention Act as a Plea-Bargaining weapon. (A fact stipulated by the U.S. Attorney on Sept. 3, 1987, before the Court.)

However, because Petitioner has been incarcerated, because his counsel has not conducted appropriate investigations, and because until the last few days Petitioner believed that the trial date in this case would be continued, the government's misuse of the Pretrial Detention Act has precluded Petitioner from accomplishing such investigation. IV) Since the latter part of July, 1987, Petitioner's present counsel has informed the Petitioner that he needed additional funds to pursue investigation and discovery in this cause. Among specific items mentioned by counsel as requiring such additional monies are the dispatching of investigators or personal travel by counsel to New Mexico, the subpoenaing of witnesses, the service of process, and the general

and extensive investigation suggested by matters discussed earlier in this Motion.

Because of Petitioner's continued pre-trial detention he has been unable to earn and to provide counsel with such funds, and his financial difficulty had prevented the defense from hiring the investigation and discovery herein discussed others.

V) On May 28th and 29th, 1987, D.E.A. Agents representing themselves to be speaking with the authority of the U.S. Attorney, assured the Petitioner that the U.S. Attorney would not pursue the pre-trial detention motion in this case and assured the Petitioner that he would be released on bail after the expiration of the ten day period imposed by the Magistrate. At that time they also made certain demands and representations to the Defendant which induced certain inactions by the Petitioner that have resulted in substantial financial losses to the Petitioner, denying his access to, and the benefit of, a sum estimated at more than

$45,000 which would otherwise have been available to him for use in his defense. U.S. v. Harvey, 814 F.2d 905.

The government made it appear for a period of time after May 29th that the representations, assurances, and demands made by the D.E.A. Agents at that time continued in effect, thereby effectively depriving the Petitioner of the financial resources which would have otherwise been available to his defense.

VI) Additional and further items which should also be investigated include the following:

A. Further investigation and interviews, or attempts to interview, many and varied New Mexico Police Officers and other non-police witnesses and parties to other searches in New Mexico similar in circumstance to the search in this case, to support the contention that pretextual stops and arrests in New Mexico are common and to support the contention that the stop and search in this case was a sham and a pretext.

B. Further investigation of Peter Affolter and other witnesses in respect to any deals, plea bargains, or other gratuities given to each or any of them in respect to this and any other case. This information is potentially vital to my defense for the possible defenses of entrapment, lack of knowledge, frame-up, or mistake of fact, as well as others. To deprive the defendant of the potential investigation of these matters would deprive the defendant of due process of law.

VII) A Severance Motion filed on behalf of co-defendant Charles Lee has been pending before this Court for more than a month. The disposition of that Motion has a potentially very important impact on my defense and may materially affect the nature of that defense.

Until it is known whether Mr. Lee is to be a co-defendant at trial it is impossible to plan a definite defense. At this time the defense does not know if Mr. Lee will be available as a friendly witness, or, indeed, a potentially hostile witness.

The ultimate resolution of this question is vitally important to the final defense strategy in this case.

VIII) On Sept. 8, 1987, the U.S. Attorney filed allegations of prior convictions for sentence enhancement in this matter. It is now additionally necessary that the Petitioner gather and prepare such materials as may be necessary to refute these newly filed allegations.

It is also now advisable and desired by the Petitioner that he investigate the ramifications of this new filing by the U.S. Attorney and weigh its impact upon the defense and defense strategy in this cause; which he may well be unable to adequately do in the short time remaining before the first scheduled date for trial.

IX) On Sept. 9, 1987, just minutes before was to mail the foregoing, I was advised by counsel, by messenger, that the principal witness, Mr. Affolter, could not be located and that the government would likely not be ready to proceed to trial on

Sept. 15th, and that counsel would see me on Sept. 11th.

On Sept. 11th and 12th and 14th counsel advised me of new items of evidence was being advised of by the Prosecution on a daily basis, and on Sept. 14th he also advised me that he was going to seek a continuance and believed that he would get it without filing this Motion, which I suggested he append to his own. At 6:30 P.M. on Sept. 14th I learned that his Motion had been denied.

For these reasons this Motion is being filed at this late date.

X) In light of the unexpected unavailability of Mr. Affolter at trial, it is now the intent and desire of the Petitioner to seek to locate Mr. Affolter for use as a defense witness, and/or to impeach other prosecution witnesses.

Petitioner does have reason to believe, and believes, that he might succeed in locating Mr. Affolter where the Prosecution has failed.

XI) The Defense needs additional time to prepare appropriate motions challenging the newly revealed evidence, to seek a severance in light of the nature of some of such evidence, and to investigate the facts and circumstances surrounding the discovery of such evidence, and surrounding securing of new witnesses in respect thereto by the government.

WHEREFORE the Petitioner respectfully prays this Court for its Order continuing the trial date for a period of 90 days.

Respectfully submitted this 14th day of September, 1987.

/s/ Larry Fassler

Larry Fassler, pro se

AFFIDAVIT OF SERVICE

I have mailed a copy of the preceding Motion for Continuance, 1st Class postage prepaid, to Bradley Myers, Asst. U.S. Attorney, 707 Florida St., Baton Rouge, LA, by depositing same in the mailbox at East Baton Rouge Parish Prison this 15th day of Sept., 1987.

Larry Fassler, Affiant

NOTE: This Motion was filed in open court the morning of September 15th, 1987, before the trial began.

APPENDIX F

AFFIDAVIT

On or about Sept. 4, 1987, I caused to be sent by Federal Express a Writ of Habeas Corpus petition to the U.S. District Court for the Central District of Louisiana, together with a money order for $120.00 which I had been told by the Clerk's Office was appropriate.

On Sept. 8th I spoke to "Pam" at the Clerk's Office by phone and verified receipt of my Petition. At her direction I spoke again to that Office at approximately 4:45 P.M., at which time a man identifying himself as a "Deputy Clerk" advised me that my Petition would be filed as part of my criminal case file and not as a separate civil matter, as I had expected and intended and though proper. He also told me that there would be no additional filing fee and that my $120.00 would be returned to me. At the same time he also asked that I send in an additional copy with my own

original signature, which I agreed to do and did that same day.

On Sept. 9th the Clerk's Office wrote to me asking for a $5.00 fee before returning my $120.00 money order.

For the foregoing reasons I believed that my Petition for a Writ of Habeas Corpus would be treated as part of my criminal case until I heard differently from Judge Parker on Sept. 15, 1987, in open court.

Signed under penalty of perjury this 15th day of Sept., 1987.

/s/ Larry Fassler

Larry Fassler

NOTE: This affidavit was filed in open court on Sept. 16, 1987. When tendered to the Court by Mr. Fisher, Judge Parker instructed him to file it in the Clerk's Office, and he did.

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	CRIMINAL NO. 87-019
	)	
vs.	)	PETITION FOR A WRIT OF
	)	
LAWRENCE A. FASSLER and CHARLES E. LEE, JR.	)	HABEAS CORPUS

COMES NOW the Petitioner, Lawrence A. Fassler, and petitions this Court for a Writ of Habeas Corpus ordering the release of Petitioner from the Detention Order issued by U.S. Magistrate Stephen Reidlinger on May 19, 1987, for the reasons which follow:

REASONS WHY THE WRIT SHOULD ISSUE

I) The Detention Order is being illegally and unconstitutionally imposed as a punitive plea bargaining tool.

II) The Detention Order was imposed in denial of Petitioner's statutory and constitutional rights to confront and answer the allegations and evidence against him.

III) The Detention Order was imposed by other than an impartial Magistrate in violation of Petitioner's statutory and constitutional rights.

IV) The Detention Order imposes an excessive and unnecessary extra burden upon the defense, unjustified by any legitimate regulatory interest of the government, and to that extent violates the Petitioner's constitutional rights to bail and to aid in his own defense.

STATEMENT OF FACTS

I. FACTS IN SUPPORT OF REASON NUMBER I ARE:

A On May 29, 1987, DEA Agent Claude Davidson told Petitioner that the detention motion had been made that day by the U.S. Attorney as a diversionary ploy to mislead associates of the Petitioner while the government sought to perfect a secret plea bargain with the Petitioner, and would be withdrawn before it was heard by the Court.

B. On June 1, 1987, U.S. Attorney Brad Myers informed defense attorney Rosemary Bickford that the detention motion would be dropped if the Petitioner pled guilty to charges carrying a maximum exposure of 30 years.

C. On June 9, 1987, U.S. Attorney Brad Myers informed Rosemary Bickford and the Petitioner that he would drop the detention motion only if the Petitioner pled guilty to charges carrying a maximum exposure of 20 years.

D. On June 11, 1987, DEA Agent Ed Descenzo of Tucson, Arizona, specifically claiming to speak with the authorization and approval of U.S. Attorney Brad Myers, told defense attorney Rosemary Bickford and the Petitioner that the government would drop the detention motion only if the Petitioner first paid over to the DEA the sum of TWO HUNDRED THOUSAND to TWO HUNDRED AND FIFTY THOUSAND ($200,000.00 - $250,000.00) DOLLARS.

E. On June 24, 1987, U.S. Magistrate Stephen Reidlinger informed defense attorneys Rosemary Bickford and Anthony Marabella that he would reconsider his detention order if the Petitioner agreed with DEA agents in Tucson, Arizona, to act as a confidential informant for them.

II & III. FACTS IN SUPPORT OF REASONS NUMBER II AND III ARE:

A. On June 12, 1987, U.S. Magistrate Stephen Reidlinger issued a detention order in which he stated as reasons that the Petitioner was engaged in the sales of heroin and that according to law enforcement officials in Arizona the Petitioner had a very violent character.

The Petitioner has never been confronted with any such evidence with the exception of remote hearsay from DEA Agent Gigante which was immediately disclaimed by the U.S. Attorney.

B. On June 24, 1987, in chambers, before a scheduled proceeding on the detention motion, U.S. Magistrate Stephen Reidlinger informed defense

attorneys Rosemary Bickford and Anthony Marabella that he would recant his allegations of heroin involvement and threat of violence as reasons for the detention motion, after being informed by the U.S. Attorney, as well as defense counsel that the government was not alleging those grounds for the detention order.

The Petitioner has never been confronted with the evidence upon which the Magistrate based his declaration of intent to recant.

C. On June 24, 1987, in open Court and immediately following the in chambers session described in (B) above, U.S. Magistrate Stephen Reidlinger once again stated as a reason for maintaining his Detention Order that the Petitioner is engaged in the trafficking of heroin.

D. On June 24, 1987, in open court, U.S. Magistrate Stephen Reidlinger also stated as a reason for maintaining his detention order his belief that no conditions of release could reasonably assure that the Petitioner would not continue

to send others on scheduled flights with the Petitioner's narcotics.

The Petitioner has never been confronted with any evidence nor allegation of such conduct.[1]

IV. FACTS IN SUPPORT OF REASON NUMBER IV ARE:

A. In seeking the Detention Order from which this writ prays release, the United States,

(1) Concedes no risk of flight;

(2) Concedes no danger to witnesses;

(3) Alleges no continuing criminal enterprise;

---

[1]During the hearing of June 24, 1987, the Defendant entered exhibits intended to show the Magistrate that the Arizona indictment then pending was based on false testimony by the Arizona detective to the Grand Jury. It is possible that the Magistrate read only the false testimony to the Grand Jury by the police officer and did not read the police transcript of the underlying interview which shows that Grand Jury testimony to be false.

Indeed, on July 10, 1987, the Arizona Superior Court remanded that indictment, making reference to the failure of the officer(s) testimony to accurately represent the facts. That indictment has not been refiled, and the statutory period to do so has expired.

(4) Has presented no clear and convincing evidence of danger to the community.

B. Two other individuals have been arrested and charged in this case. One, Charles Lee, was released on TWENTY FIVE THOUSAND ($25,000.00) DOLLARS bail. The second, Allen Haysbert, was released on TEN THOUSAND ($10,000.00) DOLLARS bail, not withstanding the fact that at the time of his release he was free on appeal bond from a California conviction for possession of narcotics in 1984, and also free under an appearance bond for California charges of possession of narcotics in 1986.

C. The Petitioner lives in Tucson, Arizona, and is employed in Burlingame, California.

D. All of the events leading to Petitioner's arrest in Baton Rouge, LA, appear to have occurred in the States of Arizona, California, and New Mexico. Thus, the focus of investigation as preparation of Petitioner's defense is in those states.

E. Petitioner is being detained in Baton Rouge, LA.

F. Petitioner has been ordered by U.S. Magistrate Stephen Reidlinger to finance his own defense.

G. If free on bail, Petitioner would be earning ONE THOUSAND ($1,000.00) DOLLARS weekly at his employment. While confined, Petitioner's earnings have been reduced to TWO THOUSAND ($2,000.00) DOLLARS monthly.

H. Petitioner's reduced earning capacity while in custody is in jeopardy because he is unable to receive mail from his employer while in custody. Efforts by both Petitioner and his employer to seek redress and/or explanation for this situation from both the Parish Prison and the U.S. Magistrate have been nonproductive.

I. Petitioner has extensive experience and a high degree of skill in the defense of criminal cases, having spent many years in such employ. He has researched, prepared and filed many writs and

appellate briefs on behalf of himself and others, several of which have prevailed in courts of various jurisdictions, including the Supreme Court of the United States.

Petitioner has also played a significant and active role in his own defense in other previous prosecutions which were ultimately resolved in his favor.

J. The Petitioner has personal investigative skills and resources which he would use on his own behalf if free on bail.

K. While in parish Prison, Petitioner's only effective means of communication with his counsel and other defense resources in Arizona is by long distance telephone, and is both limited in time and privacy, and expensive in nature.

L. In order to better aid in his own defense, the Petitioner is seeking to overturn the Detention Order, both in propria persona and through counsel. This effort has entailed, and continues to entail, substantial personal and legal expenses to

Petitioner which impinge upon, and deprive him of, already limited financial resources necessary for the defense in chief of his case.

M. The cost of Petitioner of maintaining personal and business ties with his family and interests in Arizona is significantly enhanced by virtue of his detention, and to the extent that those costs exceed what they would be in the absence of a detention order, they deprive the Petitioner of already limited financial resources for his defense.

N. Although there is a small and limited "Law Library" at the Parish Prison, Petitioner, as virtually all other inmates of the prison, has no meaningful nor useful access to it.

O. Petitioner has lived in Tucson, Arizona for 41 years, in the same house since 1954, and has all of his personal and business roots there. He is married and the father of three children, all of whom he currently supports.

ARGUMENT

I

THE DETENTION ORDER IS BEING ILLEGALLY AND UNCONSTITUTIONALLY IMPOSED AS A PUNITIVE PLEA BARGAINING TOOL.

The Detention Motion was made for reasons unrelated to those prescribed by law, and as such it is, prima facie, constitutionally faulty and must be reversed.

Assuming, for the sake of argument, that notwithstanding the statements made by DEA Agent Davidson to the Petitioner, the motive of the U.S. Attorney in filing the motion was pure, it is nevertheless clear that the government's reason for maintaining the motion was illegal and unconstitutional.

On at least three different occasions the prosecution used the threat of the Detention Motion as a plea bargaining tool to coerce a plea from the Petitioner on terms less favorable to him. Such use of the detention motion is contrary to

both the statutory and constitutional authority for the motion.

And finally, on June 24, 1987, the U.S. Magistrate who issued the Detention Order, himself indicated to the Petitioner, through counsel, that he would remove the order if the Petitioner would act as a confidential informant for the DEA. Plainly, this is the most serious abuse of a civil regulatory power for purpose of unfairly influencing the outcome of a criminal case, and is an unconscionable, if not criminal, corruption of any legitimate regulatory purpose of 18 USC.

II

THE DETENTION ORDER WAS IMPOSED IN DENIAL OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS TO CONFRONT AND ANSWER THE ALLEGATIONS AND EVIDENCE AGAINST HIM.

By the statements made in his Detention Order of June 12, 1987, U.S. Magistrate Stephen Reidlinger provided conclusive proof that he considered "fact" or "evidence" not before the court when he first issued his detention order. The only

other possible explanation for his findings in regard to heroin and violence would be that he created them out of whole cloth.

Further, on June 24, 1987, in chambers, Magistrate Reidlinger, by agreeing to recant his earlier findings, evidenced his subsequent receipt of other, contrary, evidence on the same issue. It makes no difference that the evidence he entertained out of court was on the one hand hostile to the Petitioner's interests, and on the second hand friendly to the Petitioner; it was equally unconstitutional in both instances.

The invidious nature of such extrajudicial fact-finding is amply demonstrated once again, by the Magistrate's own words for in the proceedings of June 24th, after he had recanted his findings of heroin and violence, he once again used the allegation of heroin involvement as a basis for his ruling.

When, on June 24th, he also claimed that the Petitioner was sending others on flights with the

Petitioner's drugs, he was once again basing his order on evidence or allegations not before the Court.

It is unknown where the Magistrate got the serious allegations he used in his rulings from the bench -- but they were not made in court and the Petitioner had no opportunity to confront them.

It makes no difference whether the Magistrate sought out and made independent inquiry of "law enforcement agents", or if the U.S. Attorney whispered in his ear; whichever be the case it is incontrovertible that the Magistrate was both receptive to, and influenced by, such illegal influence -- as his own words conclusively establish.

III

THE DETENTION ORDER WAS IMPOSED OTHER THAN AN IMPARTIAL MAGISTRATE IN VIOLATION OF PETITIONER'S STATUTORY AND CONSTITUTIONAL RIGHTS.

As set forth in the statement of facts part II and III and argued in the preceding section, U.S. Magistrate Stephen Reidlinger has repeatedly been

receptive to, and has used as basis for his findings, facts not legitimately before him. Further, as set forth in the Statement of Facts part I (E), the Magistrate has lent himself to the Prosecution's efforts to coerce a plea agreement from the Petitioner through illegal and unconstitutional use of the detention motion.

These facts, taken as a whole, or individually, raise such serious doubt as to the impartiality of the Magistrate that they give the appearance of partiality, and, a fortiori, put the authority and respect due the judiciary clearly ont he side of the prosecution.

IV

THE DETENTION ORDER IMPOSES EXCESSIVE UNNECESSARY EXTRA BURDEN UPON THE DEFENSE UNJUSTIFIED BY ANY LEGITIMATE REGULATORY INTEREST ON THE GOVERNMENT, AND TO THAT EXTENT VIOLATES THE PETITIONER'S CONSTITUTIONAL RIGHTS TO BAIL AND TO AID IN HIS OWN DEFENSE.

The existence of the detention order in this case has the unusual effect of severely hampering the Petitioner's defense. This is so because the

Petitioner is an able and experienced paralegal capable of great service to his own defense, but he is unable to use his own personal skills and abilities under his present conditions of detention.

The detention order also severely hampered the Petitioner's ability to finance his defense -- as ordered by the court -- because it imposes substantial extra costs on the Petitioner. These extra costs include those related to the fight against the detention order itself -- unusually justified in view of this Petitioner's personal legal skills -- as well as the costs of long distance calls, the hiring of investigators and paralegals to do work this Petitioner would normally do himself, the extra travel costs for legal aides to come to Baton Rouge from Arizona and California for consultation and the many additional indirect expenses imposed by the unusual distances involved in this case between the situs of most investigation activity and the site of his detention in Baton Rouge.

The detention order and the actual conditions of detention in this cause also impose a discriminatory financial penalty on the Petitioner by substantially reducing his earnings. As testimony at the initial appearance and at the detention motion hearing established, the Petitioner would be earning $1,000.00 a week if free on bail, but is earning only $2,000.00 a month while confined. Further, even these limited earnings while confined are now jeopardized by the Petitioner's inability to communicate by mail with his employer while in the Parish Prison.

These adverse effects of the detention order on the Petitioner's ability to personally assist in his own defense and to most effectively marshal his limited financial resources toward his own defense, when compared to the minimal -- if even sufficient -- justification for the detention order combine to have the constitutionally infirm effect of denying the Petitioner his right to assist in his own defense, as well as his right to bail, to a degree

unjustified by the legitimate regulatory interest of the government. Hence, the detention order in this case is unconstitutional and should be set aside.

CONCLUSION

The detention motion was made for reasons other than those authorized by statute, and as such it should be set aside.

The detention motion has been maintained and used for plea bargaining purposes, and as such is a travesty of the American heritage of criminal justice and constitutional law, and must be set aside.

The detention order was imposed by a Magistrate who received and was influenced by facts not in evidence, in violation of statute and of constitutional authority, and must therefore be set aside.

The detention order was imposed by other than an impartial magistrate and as such it must be set aside.

The detention order imposes an excessive and unnecessary extra burden on the defense, totally out of balance to the slight -- if even sufficient -- regulatory interest of the government, and is therefore constitutionally impermissible and must be set aside.

RESPECTFULLY SUBMITTED this ____ day of August, 1987.

LAWRENCE A. FASSLER
PETITIONER

STATE OF)
) ss.
COUNTY OF)

AFFIDAVIT

I, LAWRENCE A. FASSLER, being first duly sworn upon my oath, depose and state that to the best of my knowledge, the facts contained in the foregoing Petition for a Writ of Habeas Corpus are true and correct.

LAWRENCE A. FASSLER

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1987, by LAWRENCE A. FASSLER.

NOTARY PUBLIC

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 30, 1987
PARKER, C.J.

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 87-789-A

LAWRENCE A. FASSLER

* * * * * * * *

Lawrence A. Fassler has filed a pro se petition for a writ of habeas corpus[1] seeking to be released from the detention orders issued by the

---

[1]Although habeas corpus is generally a post-conviction remedy, the federal courts have in certain circumstances considered writs of habeas corpus brought prior to trial under 28 U.S.C. §2241(c)(3). See **Braden v. 30th Judicial Circuit Court of Kentucky**, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (habeas corpus proceeding brought by state court prisoner on speedy trial grounds); **Gully v. Kunzman**, 592 F.2d 283 (6th Cir.), cert. denied 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979) (habeas corpus proceeding brought by state court prisoner on double jeopardy grounds). In this case, the court has the power to entertain Fassler's writ under §224(c)(1) since he is in custody in this district "under or by color of the authority of the United States."

Magistrate on May 19, 1987, and June 24, 1987. The government has filed a written response. The court finds that there is no need for an evidentiary hearing and that the writ should be denied for the following reasons.

Fassler's argument is that the detention order was illegally and unconstitutionally imposed as a punitive plea bargaining tool. Essentially, Fassler claims that the Assistant United States Attorney would not have made or pursued the motion for detention order if Fassler had agreed to plead guilty and paid the Drug Enforcement Agency the sum of $250,000. The government denies the latter allegation.

Accepting Fassler's allegations as being true, the court finds no merit in this argument. Initially, the court notes that Fassler filed his petition on September 10, a few days before his trial on September 15 - 16, which resulted in his being found guilty on both counts of the indictment. Since Fassler did not plead guilty, the

alleged illegal plea bargaining tactics of the prosecutor would seem to be irrelevant. Furthermore, since Fassler is no longer being detained upon the detention order that the government moved for under 18 U.S.C. §3142, but is being detained under §3143 by virtue of his being convicted, the issue is now moot.

Although the other grounds raised in the writ may likewise be moot, the court will consider these arguments in view of the fact that they could possibly be relevant to a motion for release from his present detention under §3143. Fassler's second and third grounds are that the magistrate considered matters that were not in evidence thereby depriving him of his right of confrontation and raising "serious doubts" as to the impartiality of the magistrate.

These argument have no merit. The court has previously conducted a de novo review of the magistrate's detention orders and has carefully reviewed the transcripts of the hearings and

exhibits, as well as additional evidence presented in this court. As indicated in the court's ruling on September 10, 1987, there was clear and convincing evidence to support the magistrate's conclusions. The court further found the magistrate's reasons to be well founded.

Fassler's final argument is that an "excessive and unnecessary extra burden . . . unjustified by any legitimate regulatory interest of the government" was placed upon him at the detention hearings. Fassler claims that this extra burden violated his constitutional right to bail and to aid in his own defense.

In ordering Fassler's detention, the magistrate and the court acted pursuant to 18 U.S.C. §3142. Essentially then, Fassler is challenging the constitutionality of §3142, which authorizes the pretrial detention of arrestees charged with serious felonies who are found to pose a threat to the safety of the community which no condition of release can dispel. A similar argument was made and recently

rejected by the Supreme Court in **United States v. Salerno**, ____ U.S. ___, 107 S.Ct. 2095, ___ L.Ed.2d (1987). The court further finds Fassler's argument relating to his inability to prepare his defense to be unpersuasive. Fassler has failed to point to any specific prejudice to his defense, nor has he in any way suggested that the preparation by his attorney has been inadequate.

Accordingly, the petition for writ of habeas corpus has no merit and will be DENIED.

* * * * * *

/s/ JP

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CIVIL ACTION

VERSUS

NO. 87-789-A

LAWRENCE A. FASSLER

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that petitioner's writ of habeas corpus be, and it is hereby DENIED.

Baton Rouge, Louisiana, October 6, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
OCTOBER 26, 1987
PARKER, C.J.

LAWRENCE A. FASSLER

CIVIL ACTION

VERSUS

NO. 87-789-A

UNITED STATES OF AMERICA

* * * * * * * * *

Petitioner, Lawrence A. Fassler, has filed a pro se "Motion For Rehearing" on the denial of his petition for writ of habeas corpus, claiming he was unfairly deprived o an opportunity to respond to the government's answer to the writ. Fassler also filed a "Reply to Respondent's Answer" in support of his motion for rehearing.

A review of these pleadings discloses no new arguments pertinent to the habeas corpus petition, which relates solely to the detention orders. Fassler's additional claims of prejudice relating to

evidence presented at trial are not within the scope of these proceedings.

Accordingly, the motion for rehearing is without merit and is hereby DENIED.

Baton Rouge, Louisiana, October 26, 1987.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX J

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

MICHAEL STEPHEN SHEPHERD

Who, being duly sworn, deposed and said the following:

I was contacted by Attorney Nathan S. Fisher to view and listen to a V.H.S. Videotape involving a client of Mr. Fisher's. With no knowledge other than it involved an unnamed client, I attempted to electronically process the audio portion of the V.H.S. Videotape, with the goal of transcribing the conversation(s) of the tape.

The audio portion of the tape was found to have broad band radio "Noise" (static, hum, etc.) to a degree generally equal to that of the actual transmitted signal on the audio recording.

After trying numerous combinations of equalization and noise reduction techniques, I found it would be impossible to transcribe the audio accurately, if at all.

I requested information from Mr. Fisher as to whether the individuals on the videotape could be possibly speaking in a "cajun" dialect or accent, and was informed that was not the case.

I was later qualified in Federal Court as an expert witness and testified to the above.

Subsequent to that testimony, I was asked by Mr. Fisher to review and comment on the testimony of government witness Trooper Gurley Hamilton Mixon III.

After several readings of Trooper Mixon's testimony and re-listening to the complete audio portion of the videotape, I have come to the

following conclusions:

1.

The audio portion of the videotape is and has always been unintelligible and inconclusive as to anything that may have been said between the principals on the videotape.

2.

Because of the camera "framing" of the picture and the principals, it cannot be determined which individual is speaking any point, which, when combined with the tape's lack of audio intelligibility renders it impossible to objectively attribute a particular utterance to a specific principal on the videotape.

3.

It is my opinion that the "noise" on the audio portion of the videotape was induced at a point prior to the audio signals exit from the receiver which picked up the wireless microphones's transmission.

By testimony of Trooper Mixon, the transmission distance of 75 to 100 yards was a borderline acceptable distance for reception, especially in the area designated the site; an area very prone to interference from microwave transmission interference from the numerous signal paths in use in that area.

Regarding the testimony of Trooper Mixon that the "noise" was introduced to the system through a wire connecting the receiver to the V.H.S. videotape recorder, I cannot agree with his statement. The noise from an improperly installed or improperly filtered power supply to in an air conditioning system would more readily attack an "in use" receiver than an interconnecting wire (as stated by Trooper Mixon). Further, had this interference been so strong as to penetrate an interconnecting cable (wire) in the manner described by Trooper Mixon, it would have almost certainly penetrated the wire interconnecting the video camera to the V.H.S. videotape recorder, of

which no evidence is seen in the video portion of the tape which is quite clear and free of grounding or static interference.

Additionally in listening to the complete videotape, including the portions after the arrest had occurred, the audio clears with the apparent interruption of the receiver, providing a normal audio track free of interference, this according to Trooper Mixon's theory, would only have been possible had the interconnecting wire been unplugged at the videotape recorder end.

4.

Due to the factors of distance, geographic location, and analysis of "noises" and interferences heard, it is my opinion and belief that the audio interference occurred between the point of transmission (wireless microphone transmitter) and the point of reception (van housing wireless microphone receiver).

5.

I regard Trooper Mixon's testimony that he (or anyone else listening to the source used to make the videotape) heard a clear or different quality of audio to be at the very best highly improbable if not impossible. I believe that the videotape represents the appropriate quality of audio transmitted, received, recorded and heard in this situation.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

CHARLES LEE, JR. AND LAWRENCE FASSLER

CRIMINAL NO.: 87-19-A

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, personally came and appeared:

LARRY L. WARD

Who, being duly sworn, deposed and said the following:

On or about the twentieth day of October, 1987, I had the opportunity to view and hear a certain recording that I was told pertained to the trial of U.S.A. vs. Lawrence Fassler, et al. I offer the following benefits and professional opinions as to what I heard and saw on the above mentioned tape.

I heard three distinct signals recorded on the audio portion of the tape. There was a very

intense noise, an unmodulated carrier of short duration, and a very weak carrier with modulation somewhat lower in amplitude than the noise level. The minor quieting effect produced by the unmodulated carrier upon the noise leads me to believe that the noise was of the same nature as that of the other signals primarily being received via the antenna system and not through any other wired sources. Having read a portion of the transcript of the trial on September 15, 1987, I can only speculate as to the exact way that the system for recording the above mentioned tape was connected. There was mentioned a certain "wire" between the receiver and the recorder that was picking up the noise. I do not believe that this "wire" an apparent output connection was acting as a part of the antenna system. Also, it is my understanding that there were no other tap connections to this "wire" connection and that certain signals were heard clearly meaning that there was less of an absence of the noise that was present on

the recording. At no time did I hear cessation of the noise to the level that I could understand or comprehend the modulated carrier that was present and mixed with the noise. From the signals that I heard recorded on the tape, it is my belief and personal opinion that the mixed signals existed throughout the entire audio chain including the actual recording voltage presented to the audio recording head of the recorder and short of some deciphering device of which I have no knowledge were recorded exactly as was received on the antenna of the receiver apparatus.

From years of experience I have found it very difficult to separate signals after mixed when they are of a wide frequency range. A single tone type of signal is easy to filter from a band of frequencies. From experience and facts gained from hearing and viewing the recorded tape, I do not believe that the recording device was contributing to or was receiving any of the observed noise signal through any other means than the

"wire." I base my reasoning upon the fact that I saw no evidence of noise present upon or affecting the quality of the video picture. Experience has shown me that most electrical noise interference of the nature that I heard on the audio recording if introduced through a power source would appear in the output of and device to a more or less extent depending upon the degree of filtering ability of the power supply. An unmodulated carrier received by an antenna system will not reduce a noise that is being received through the power supply of the receiving or recording device. An unmodulated carrier will have the effect of reducing noise received via the antenna system as in the audio recording that I heard. The carrier must be of sufficient strength to effect this reduction of noise. This action is well known in the radio field as "carrier to noise ratio." In the case of the modulated carrier mentioned as one of the observed signals recorded on the audio portion of the tape, it was very apparent to me that the

"ratio" was very poor, the carrier present was so weak as to present very little quieting effect and thus a very low "carrier to noise ratio."

In summary, after reviewing the videotape and transcript of Trooper Mixon it is my opinion that his statements regarding having heard a more clear conversation than was recorded on the audio portion of the videotape is highly improbable and unlikely.

Further, I submit the following qualifications for the courts perusal:

Larry L. Ward
6628 Highland Road
Baton Rouge, Louisiana 70808
Telephone: (504) 766-4663

Date of Birth: 7-27-38
Age: 49
Employment:

Baton Rouge Broadcasting WJBO, WFMF-FM, Southern States Network

Position: Chief Engineer

Experience and Education:

30 years experience in broadcast engineering and electronics.
Federal Communications Commission Radiotelephone License.

Devry Institute, Electronic Instrumentation and Control. BS Degree at L.S.U. concentrating in Electrical Engineering, Geology, Nuclear Science, Business and Social Studies.
16 years in two way radio installation and service.
Chief Engineer of Radio Stations since age of 18.
Numerous Applications and Exhibits accepted and on record-FCC.
Four years as electronics in Naval Reserve.
Electronics Instructor WKG Video Electronic College.

I submit the above beliefs and professional opinion based solely on the tape recording and portion of the trial transcript (Trooper Mixon's testimony) that I have reviewed.

THIS DONE AND PASSED in my office in Baton Rouge, Louisiana this 3rd day of November, 1987, in the presence of the undersigned competent witnesses.

WITNESSES:

/s/ Melissa B. Garrison

/s/ Jill E. Lishank

/s/ Larry L. Ward

/s/ Notary Public